

B.A.F., Inc. and 4-Star Construction Corp. and United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the U.S. and Canada, Local 42. Case 8-CA-21915

March 22, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On September 28, 1990, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a brief, and the Charging Party filed a brief in response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, B.A.F., Inc. and its alter ego 4-Star Construction Corp., South Euclid, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The Respondent has excepted, inter alia, to the judge's finding that B.A.F. did not have its own equipment. We note that Aleria Brown testified without contradiction that B.A.F. had its own office equipment and did not use that of 4-Star. Aleria Brown also testified without contradiction, however, that B.A.F. did not have its own construction equipment and that the employees used that of the general contractor (4-Star). In any event, we agree with the judge that the evidence taken as a whole clearly warrants a finding that B.A.F. and 4-Star are alter egos.

Nancy A. Butler, Esq., for the General Counsel.

Mrs. Aleria Brown, of South Euclid, Ohio, for Respondent B.A.F., Inc.

Gerald F. Penca, Esq., of Cleveland, Ohio, for Respondent 4-Star Construction, Corp.

Joseph Allotta, Esq., of Toledo, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. On a charge filed June 26, 1989, by United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 42 (the Union), a complaint was issued January 31, 1990, alleging that (1) B.A.F., Inc. (BAF) and 4-Star Construction Corp.¹ (4-Star) have been affiliated business enterprises with common officers, ownership, directors, management, and supervision, have formu-

¹ On brief, the General Counsel moves for the correction of the case caption in view of the name specified in the Articles of Incorporation, G.C. Exh. 10. The unopposed motion is granted.

lated and administered a common labor policy affecting employees of said operations, have provided services for and to each other, have interchanged personnel with each other; and have held themselves out to the public as a single integrated business enterprise; (2) by virtue of their operations BAF and 4-Star constitute a single integrated business enterprise and a single employer within the meaning of the National Labor Relations Act (the Act), and/or BAF is the alter ego of 4-Star; (3) alternatively, BAF and 4-Star have been parties to a contract whereunder BAF is the agent for 4-Star in connection with referring employees to 4-Star for its construction projects; (4) 4-Star has exercised control over the labor relations policy of BAF; (5) BAF and 4-Star have been joint employers of the employees of BAF; (6) since August 1988, the Union, by virtue of Section 8(f) of the Act and a described 1988-1991 collective-bargaining agreement, is the exclusive representative of a described unit;² and (7) since February 16, 1989, Respondent has refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in a specified unit by refusing to apply the terms of a described 1988-1991 contract to the employees in the unit, in violation of Section 8(a)(1) and (5) of the Act. BAF filed an answer denying each and every allegation contained in the complaint and indicating that BAF ceased operations in July 1989. 4-Star denies violating the Act.³

A trial was held in Cleveland, Ohio, on May 22 and 23, 1990. On the entire record in this case, including my observation of the demeanor of the witnesses, and consideration of the briefs filed by the General Counsel, 4-Star and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material here, BAF maintained an office and place of business in South Euclid, Ohio, where it has been engaged in providing labor services, which services in 1988 were valued in excess of \$50,000, for 4-Star, which itself is engaged in commerce on a direct basis. 4-Star, which has been engaged in mechanical and general contracting, admits that in the course and conduct of its business operations it has purchased and received at its Cleveland, Ohio facility products, goods, and materials valued in excess of \$50,000 directly from points outside of the State of Ohio. Based on the above, I find that both BAF and 4-Star are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

In view of the collective-bargaining agreements treated below and in view of the testimony of the Union's witnesses, I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

² The unit is described as follows:

Employees engaged in plumbing, steamfitting, pipefitting, refrigeration and shopkeeping within the jurisdiction of the Union as set forth in the preamble of the collective bargaining agreement between the Union and Mechanical Contractors Association of North Central Ohio, LRD Division effective July 1, 1988, through June 30 1991.

³ Respondent asserts the affirmative defense of res judicata. At the end of the trial here 4-Star amended its answer to include the defense of collateral estoppel.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Facts*

4-Star was incorporated in the State of Ohio in 1980. (G.C. Exh. 10.) The Articles of Incorporation were signed by Percy Brown, Wallace Brown, and Otis Brown, and Pete Brown,⁴ of 1409 Addison Road, Cleveland, Ohio, was appointed as agent for service. The first three-named individuals are brothers and equal owners of 4-Star and the last-named individual is their father. Percy Brown testified that he is the corporate secretary-treasurer, Wallace is president, and Otis is vice president; that the business purpose of 4-Star is construction; that 4-Star is a certified minority business enterprise; and that he and his wife and his brother Otis and his wife also lived at 1409 Addison Road. At a point in time 4-Star's office was located at 1409 Addison Road. At the time of the trial herein its office was located at 2451 Woodhill Road. Percy Brown testified that 4-Star has been at the Woodhill Road location for approximately 5 years.

BAF was incorporated in the State of Ohio in 1984. (G.C. Exh. 2.) Beverly Brown, of 1409 Addison Road, was appointed its agent for service. Aleria Brown testified that it was her idea to establish this company with some advice from her husband; that BAF was formed to provide labor for 4-Star on a job 4-Star bided on; and that it was an opportunity for her to own her own business.⁵ Just before BAF was formed Aleria Brown was working as a medical secretary at the University Hospital of Cleveland.⁶ Percy Brown testified that it was his idea to start BAF; and that a major construction company from out of the area, Ti-Bert, approached 4-Star to provide minority business enterprise labor services to it on a very large project and he did not want 4-Star to do it because of the possible liability if Ti-Bert went out of business or defaulted on payments so he approached his wife and his brothers' wives about forming BAF. According to Percy Brown's testimony, while 4-Star has employees, it gets the plumbers and pipefitters it uses from other companies. BAF remained dormant for some time.

In 1986 BAF began to supply labor to 4-Star. According to the last page of General Counsel's Exhibit 2, on July 14, 1986, by action by written consent of the board of directors of BAF, the following individuals were nominated, appointed, and elected to act as officers of BAF for a specified period: Bridgette Brown, president; Aleria Brown, vice president; and Mary Gross Hill, secretary/treasurer.⁷ All three of the individuals named as officers were also directors. The written consent did not change the appointment of the agent for service and Aleria Brown testified that papers were never filed with the State changing the designated agent. According to Aleria Brown's testimony, she owns one-third of the stock in BAF and the two other officers own the remaining stock.

⁴The original appointment refers both to Peter and Pete.

⁵She testified that BAF was formed as a female minority corporation. Percy Brown testified that BAF never became a certified female minority business enterprise.

⁶She testified that she used \$100 from her paycheck to pay for the incorporation.

⁷As noted above, Aleria Brown is married to Percy Brown. Bridgette Brown is her niece and Beverly Brown is married to Percy's brother Otis. The letters BAF were taken from the first letter of Beverly, Aleria, and Francine Brown, who is married to Percy's brother Wallace.

She testified that she does not own stock in 4-Star and her husband testified that he does not own stock in BAF.

Michael Sherman, who is a business representative for the Union, found out that 4-Star was awarded the plumbing contract at the Lorain Correctional Institute project (Lorain). On June 22, 1987, he contacted Percy Brown and asked him if 4-Star was going to work Lorain or if 4-Star was going to use a subcontractor. Percy Brown did not know at that time. Sherman told Brown that a contract package would be sent to him for his review. The package was mailed the next day.

In July 1987 Percy Brown met with Michael Sherman and David Mitchell, who is the business manager and financial secretary of the Union, at Lorain. 4-Star had a contract on project. Sherman and Mitchell gave Percy Brown a collective-bargaining agreement. He explained to them that 4-Star did not provide its own labor in the plumbing trades and that it secured its labor from BAF. Regarding this meeting, Sherman testified that it occurred on July 14, 1987; that he and Mitchell met with Percy Brown and Richard Burke, who was introduced as the onsite representative of 4-Star; that he and Mitchell reviewed the terms and conditions of how the Union supplies employees, the wages, working conditions, and fringe benefit reporting forms; that Percy Brown stated that the plumbing and pipefitting labor would be performed by a subcontractor; and that BAF was mentioned by Percy Brown but Aleria Brown was not present.

During two subsequent telephone conversations on July 17 and 21, 1987, Percy Brown told Sherman that BAF could not secure the wage and fringe benefit bond as required by the contract. Sherman reviewed the alternatives with Percy Brown.

Sherman testified that on July 27, 1987, he spoke with Percy Brown who indicated that he would probably opt for the weekly payment of fringe benefits and that he would have the signed agreement onsite the next day, as well as the letter of request for the foremen pursuant to the collective-bargaining agreement.

General Counsel's Exhibit 7 is a letter dated July 27, 1987, from BAF to the Union requesting the Union to send John Palmer out as foreman for BAF at Lorain. It is signed by Aleria Brown, vice president, BAF.

On July 28, 1987, Aleria Brown signed a collective-bargaining agreement for BAF with the Union. (G.C. Exh. 3.) The agreement was effective to June 30, 1988. Aleria Brown testified that she never met with the Union to discuss the collective-bargaining agreement before she signed it. Her husband, Percy Brown, gave her the agreement and explained it to her before she signed it.

Sherman went to the Lorain site on July 28, 1987, and picked up the above-described documents. Percy Brown indicated that weekly fringe benefits would be paid.

Mitchell testified that he first discussed the fact that fringe benefit payments were late with Percy Brown in October 1987. Assertedly, Percy Brown told Mitchell that he would get the fringes in as soon as possible.

Percy Brown testified that he did not make job calls into the Union for workers he needed at Lorain in 1987; that he did not oversee the work of the employees on the Lorain site but rather he oversaw Palmer, the project superintendent, who oversaw the workers; and that he decided when to add employees and when to lay off employees at the construction

site. Mitchell testified that in August 1987 he received a job call from Percy Brown.

General Counsel's Exhibit 6(f) contains a stub, number 1529, of a BAF check dated "11/24 1987" which reads "TO 4-Star" for \$4000. Percy Brown could not explain why 4-Star would have received this check. He testified that 4-Star never loaned any money to BAF.

Mitchell testified that he received a job call from Percy Brown in December 1987 requesting manpower. Assertedly this was the second time Percy Brown made a job call to Mitchell.

General Counsel's Exhibit 8 is an Employer's Quarterly Tax Return dated "1-26-88" for BAF. It is signed by Aleria Brown, president.

Aleria Brown testified that she became president of BAF in February 1988; that she became more active because she had been laid off from her job at University Hospital; and that at BAF she took care of the paperwork, including keeping the union reports, typing, and filing. She had a telephone installed in her own name in her home. She testified that she never used 4-Star's telephone or facilities; that she had BAF's office equipment in her house, the house she shares with her husband Percy; that she did not know if BAF used the same accounting firm as 4-Star; that she signed BAF checks and her husband Percy was also listed as someone who could sign BAF checks after Bridgette Brown left the Company; that she did not pick another officer of BAF to also sign checks because they were not active with the Company at the time; that she had 1-1/2 years of college and she took a construction management course to prepare her for running BAF; that she had no experience in the construction industry prior to the establishment of BAF; that she had never worked personally on a construction project or for a construction company; and that BAF did not supply labor for any company other than 4-Star. When Aleria Brown became active with BAF in February 1988 it was involved with supplying labor to 4-Star at a major project, namely, Lorain. Bridgette Brown was responsible for running BAF before that according to Aleria Brown. Aleria Brown's husband, Percy, assertedly did not assist her in performing her tasks when she became active in BAF in February 1988. He did give her the hours worked by the employees who she supplied to 4-Star.

Percy Brown testified that BAF does not use anything of 4-Star's things to operate its business; and that BAF has its own workers compensation certificates and it handles its unemployment taxes.

Regarding BAF supplying 4-Star with labor, Aleria Brown testified that the labor is provided pursuant to a verbal agreement; that her husband notified her how many employees he would need at 4-Star; that she never participated in the supervision of the employees who worked at 4-Star's construction sites; that her husband is authorized to indicate what jobs and tasks BAF employees should perform on the job; that her husband reported to her regarding what tasks he assigned to the individuals and she never overruled his decisions; and that she never actually called the Union and requested that employees be sent to the jobsite. In fact, she testified that her husband handled the relations between BAF and the Union. Aleria Brown testified that BAF does not own any construction equipment; that it uses the general contractor's equipment; that the general contractor "is the owner

of the company that asks me to provide labor to their company" or in other words 4-Star; that BAF checks payable to her husband Percy might be payment to him personally for advice he gave her or a loan he gave to her on occasion; and that she did not give her husband loans. Aleria Brown testified that 4-Star provided loans to BAF but she could not know how much they involved. Subsequently she testified that she viewed such transactions as an advancement in payment for labor provided. And later she testified that "maybe [there were] no more than one or two [loans]." She could not recall the amounts or the dates. She did recall that there were no loan agreements and that the loans had not been paid back. Subsequently, Aleria Brown testified that 4-Star, on more than one occasion, provided advancements to BAF so that it could meet its payroll, and that there was no documentation signifying that it was an advancement. Also, Aleria Brown testified that 4-Star advanced money to BAF to enable it to pay union dues and fringe benefit payments, and that BAF had an understanding that when it billed 4-Star for labor BAF provided, the money previously advanced would be subtracted from the money owed.

Percy Brown testified that 4-Star owns construction equipment but that it has never leased such equipment to BAF.

Mitchell testified that Percy Brown made a job call to the Union in May 1988. Assertedly this was the third job call he received from Percy Brown.

Sherman testified that in June 1988 Percy Brown telephoned the Union four times regarding clarification of job calls for Lorain and another project 4-Star had secured, Elyria Wastewater Treatment Plant and to ask about the "shop-keeper's" provision in the agreement.

Mitchell testified that in July 1988 he spoke to Percy Brown about the fringe benefit payments being late and Percy Brown said that he would get the fringes in as soon as possible. This discussion was assertedly repeated in August 1988.

Palmer testified that approximately a year after he was hired for the project, he was elevated from foreman to the superintendent's position when Burkes left the project; that he took his instructions from Percy Brown; that Percy Brown and not Aleria Brown instructed him to make job calls to the Union; that he called in manhours to either an answer machine or occasionally Aleria Brown; that he was instructed to distribute paychecks by Percy Brown; that he contacted Percy Brown if there was a problem at the site; that he discussed any jurisdictional disputes at Lorain with Percy Brown and not Aleria Brown; that Percy Brown would bring fringe benefit reports to the jobsite and Palmer would deliver them to the union hall; and that when he purchased supplies with his own money, Percy Brown reimbursed him.

On August 1, 1988, Aleria Brown signed a memorandum of agreement as president of BAF with the Union. (G.C. Exh. 4.) The agreement, with specific exceptions, continues the then current collective-bargaining agreement until June 30, 1991. (G.C. Exh. 14.)

Percy Brown denies that he spoke with Mitchell in the summer of 1988 and told him not to speak with his wife Aleria with respect to delinquent fringe benefit reports. Mitchell testified that in mid-1988 he discussed the late fringe benefit payments with Aleria and she told him that he would have to speak with her husband Percy Brown about it; and that a couple of days later Percy Brown telephoned

him and advised Mitchell that he “was to talk with him [Percy Brown] *in regard to labor relations, not Aleria.*” (Emphasis added.)

Sherman testified that on September 13 or 15, 1988, he telephoned Percy Brown about a letter Aleria Brown sent to the Union regarding qualified female journey persons; that he telephoned Percy Brown because Aleria Brown was not available; and that he and Percy Brown also discussed delinquent fringe benefits with Percy Brown indicating that a check would be forthcoming.

In September 1988, according to the testimony of Mitchell, a paycheck given to an employee of BAF, Mike White, had “bounced.” Mitchell telephoned Percy Brown who assertedly said that the check should be redeposited and he would transfer moneys into the account to cover the bounced check.

According to her testimony, in November 1988 Aleria Brown began to work at Mt. Sinai Medical Center where she was working at the time of the trial herein.

On November 28 or 29, 1988, Sherman telephoned Aleria and Percy Brown and left messages that the fringe benefit fund payments were delinquent again; and that he received a telephone call from Percy Brown the next day and he was told that it would be taken care of as soon as possible.

Three BAF check stubs, numbers 1123, 1124, and 1125, are marked payable to “PB” with a question mark near the initials on each stub. (G.C. Exh. 6(g).) The amount on the stubs are \$600, \$800, and \$800, respectively. The stubs are not dated. Stub 1122 is dated “12/22/88” and stub 1126 is dated “12/23/88.” Aleria Brown testified that she did not know what these checks were for or whether the checks were even written. According to the stub, check number 1122 was made payable to Aleria Brown for \$360.⁸ Aleria Brown testified that BAF did not pay her husband, Percy Brown, from time to time. She speculated that it might have involved her husband obtaining materials, supplies or equipment for BAF because BAF did not have a credit rating. According to Aleria Brown’s testimony, 4-Star used its credit to allow BAF to obtain equipment.

Regarding whether BAF’s check stubs accurately reflect what was going on between the two corporations, Percy Brown testified that the only money transferred to BAF from 4-Star was in the form of payments for labor provided; that at some point 4-Star may have advanced some money “but we never provided . . . [BAF] with a loan of any kind other than an advancement for services to be rendered”; that he has personally loaned his wife, Aleria Brown, money for the purpose of doing something with BAF; that

No agreement was formed or nothing like that and if you see some checks with my name on them that might have been a payment back to me from loaning her money. That could have been a check that I had gotten from her. I might have—you know, maybe I’d had a problem with an employee on the job which I wanted to pay off. It could have been a check that I got for that. Maybe I needed some material for a job and she might have advanced me a check. There’s a lot of cir-

cumstances which I could have received a check from her as just taking money from BAF for me personally that wasn’t deserved;

that he would have to say that Aleria paid him back for the loans or personal moneys that he gave her to start up the business “but when, I can’t answer that”; and that he never used any indebtedness between BAF or his wife, Aleria Brown, and himself as leverage to control BAF.

Mitchell testified that he called Percy Brown about fringe benefit payments being late in December 1988 and that Percy Brown said that he would get them in.

Percy Brown testified that on occasion he might have made job calls to the Union for workers needed at Lorain in 1988 but that it was not a standard practice; and that he would only call the Union if he needed a specific minority or female.

On January 23, 1989, Sherman telephoned Percy Brown about a fringe benefit delinquency. BAF had secured a bond so it was on a monthly fringe benefit reporting system. Percy Brown said that there were some serious problems at Lorain and he wanted to speak to the union representatives.

On January 26, 1989, Percy and Wallace Brown met with Sherman and Mitchell at the Union’s office to discuss Lorain. Sherman testified that a delinquent fringe benefit check was given to the Union; and that Percy Brown stated that (a) he doubted that there would be any more after that one; (b) the job and the company were both in serious financial difficulty; (c) the general contractor, Turner Construction, wanted 4-Star to supply additional manpower because the project was behind schedule; and (d) he was considering additional subcontracting with family members or independent lump sum contractors. Mitchell testified that at the end of this meeting he and Sherman indicated that the use of family members who were not union members would be a violation of the collective-bargaining agreement.

After the January 26, 1989 meeting, Mitchell contacted the bonding company and informed them of what was going on.

On January 31, 1989, Sherman telephoned Percy Brown and asked him if additional people had arrived on the site. Percy Brown told Sherman that three independent lump-sum contractors were on site, namely, Loren Brown Plumbing, Darell Reese Plumbing, and James Moore Plumbing. Sherman testified that Percy Brown then indicated that he wanted to bring one of his Local 55 journeymen over to work on the site; and that he told Brown that that would be a violation of the hiring hall procedure since no job call currently existed with BAF. Sherman and Mitchell went to the jobsite and met with Percy Brown and Richard Bickmore, the Union’s steward on the job. Brown reiterated his position and Bickmore indicated that his most recent paycheck had “bounced.” Brown was advised that the Union was withholding services because of these matters. Sherman testified that the people who Percy brought onto the site under the guise of independent lump-sum subcontractors were BAF employees and consequently there was a violation of the Union’s referral procedures with BAF; and that he and Mitchell asked the construction manager, Turner Construction, if these “subcontractors” had the necessary workers’ compensation, unemployment, and insurance certificates and they were told that they did not. Mitchell testified that the individuals he saw working at the Lorain site were Percy

⁸ She speculated that this could have been used for office supplies. Regarding what she charged BAF for her services, Aleria Brown testified that she maybe paid herself by the hour but she could not recall the rate; that she took payment whenever money was available; and that it was on an irregular basis.

Brown, Wallace Brown, Otis Brown, and BAF employees: Warren Brown, James Moore, and Moddy Medifee; and that after telephone calls to the Secretary of the State of Ohio, the Department of Industrial Relations, the Ohio Bureau of Employment Services, Workers' Compensation, and Plumbers Local 55 in Cleveland, he determined that James Moore, Darrell Reese, and Warren Brown⁹ were in fact employees of BAF for while they were working at Lorain they were simultaneously working in Cleveland as BAF employees. Mitchell also pointed out that the collective-bargaining agreement between the Union and BAF provides that all sub-contractors to the signatory will be union contractors in regard to plumbing and pipefitting and related work; and that the agreement has a provision for exclusive hiring hall.

After the above-described checked "bounced," the Union contacted the bonding company and advised them that the Union was going to withhold manpower to limit liability. Sherman testified that the bonding company agreed; and that he estimated that BAF was approximately \$5000 in arrears on the fringe benefit payments at this point. Eventually all the fringe benefit payments were made.

Sherman testified that on February 2, 1989, he and Mitchell went to the Lorain site, informed Percy Brown that there were some payroll checks that had not been issued yet, that the fringe benefits were delinquent again, and that they wanted to talk about resolving the situation as it existed on the site. According to Sherman's testimony, Brown indicated that nothing could be discussed with the exception of the paychecks until the Union "got square with . . . Brown's bonding company." Mitchell testified that they told Percy Brown that the Union had filed a grievance against BAF and they requested Brown to remove the involved individuals from the jobsite; and that they told Brown that they advised the bonding company that the Union might be making a claim against the bond.

On February 16 Sherman and Mitchell met with Percy Brown at Lorain. The terms and conditions for bringing the Union's people back to work were discussed but Brown would not agree to the terms. Sherman testified that when he and Mitchell walked the site they found not only the three independent contractors but also several other people; that Percy Brown said that they were family members and owners of the business and none of the Union's concern; and that Percy Brown said that BAF had been dismissed as sub-contractor to 4-Star at Lorain.

Aleria Brown testified that prior to the third-step grievance meeting of February 1989 she never met union representatives Sherman and Mitchell. Sherman testified that other than some items of correspondence he did not have any contact with Aleria Brown after she signed the contract in July 1987. And Mitchell agreed with Aleria Brown that this was the first time he met her. Mitchell also testified that Aleria Brown never made job calls to the Union.

According to Aleria Brown's testimony BAF became inactive in July 1989 and since then it has not had any employees or customers.

General Counsel's Exhibit 9 is BAF's monthly combined reporting forms to Plumbers Local 55 in Cleveland for the period beginning May 28, 1989, and ending November 29,

1989. All the reports which show that BAF had employees working during this period were signed by Aleria Brown.

The business manager of Plumbers Local 55, Jim Sullivan, testified that Local 55 had a collective-bargaining agreement with BAF which was effective from May 1, 1988, to April 30, 1990; that at the time of the trial herein Local 55 employees were being referred through BAF to a watertreatment plant; that the foreman on the job is Dick Szucs; that he has received job calls for Local 55 members from Percy Brown but the last few calls have been through the foreman; that he met Aleria Brown once at Local 55's hall and once socially; that the fringe benefit reports are mailed in; that he has not received any notification that BAF has gone out of business; that Szucs, James Prochko, John Mulvey, and Monty Menefee are members of Local 55¹⁰; that Darrell Reese and Lorne Brown were in the process of becoming members of Local 55 but it was questionable at the time of the trial herein; that James Moore is an ex-member of Local 55; that he received job calls from Percy Brown regarding Lorain in approximately May 1989 after the job, which had been down for a while, had started back up; and that the job calls were for employees based on the agreement Local 55 had with BAF.

B. Analysis

In my opinion an alter ego relationship exists between 4-Star and BAF. As pointed out in *Kenmore Contracting Co.*, 289 NLRB 336 (1988), in determining alter ego status the Board considers whether the companies have substantially identical ownership, management, business purpose, operations, customers, equipment, and supervision. No one factor is controlling.

It was noted by the Board in *Kenmore* that a finding of common ownership may be made where, although the same individuals are not shown to be owners of each corporation, the corporations are solely owned by members of the same family. In view of (a) Aleria Brown's financial dependence on her husband; (b) BAF's financial dependence on 4-Star; and (c) the numerous less than arm's-length dealings spread throughout the record, it is my opinion that there is common ownership. BAF was Percy Brown's idea. At the time he wanted to shield 4-Star from possible liability. While Aleria Brown, who apparently worked as a full-time secretary at the time, testified that she paid the \$100 fee when the Articles of Incorporation were filed, there had to be other start up costs. For instance, who paid the attorney who drew up the papers? Apparently it was the same attorney who drew up 4-Stars incorporation papers, the same attorney who represents 4-Star herein. Percy Brown testified that he would have to say that his wife paid him back for the loans he gave to her to start up BAF but he could not say when.

The record indicates that Percy Brown ran 4-Star. It also indicates that with respect to BAF, Aleria Brown's role was almost exclusively administrative in that she handled the typ-

⁹Later in the record the name is specified as Lorne Brown.

¹⁰Szucs, Prochko, and Mulvey were listed as employees by 4-Star on certified payroll reports of September 1989 which 4-Star filed with the State of Ohio with respect to Lorain. Percy Brown testified that the documents were prepared by the 4-Star secretary; that the purpose of the documents is to show that the employees were paid prevailing wages on this state project; that BAF was not involved because none of the people are employees of BAF and BAF no longer supplied plumber labor to 4-Star and at that time the work was "punch list" work.

ing, filing, and fringe benefit reports. She could not explain BAF check stubs which were dated during the time she was active in the running of BAF. She authorized her husband to sign BAF checks. She could not explain payments to 4-Star and apparently also to her husband. Her husband handled whatever negotiations there were regarding the collective-bargaining agreement between BAF and the Union. In fact Percy Brown handled almost all the matters which came up between the Union and BAF. When a problem arose he was the one who said he would take care of it, i.e., saying that money would be deposited to cover one of the "bounced" checks. He is not credited regarding his denial that he told Mitchell to speak to him and not his wife Aleria about the delinquent fringes. Mitchell testified both Aleria and Percy Brown told him that he would have to speak to Percy Brown about the labor relations between the Union and BAF. Aleria Brown did not deny this. In fact at one point she testified that her husband handled the labor relations between BAF and the Union. Percy Brown's denial is not credited. It must be concluded that common management existed between BAF and 4-Star.

With respect to business purpose, the fate of BAF rested on 4-Star for the latter was the only customer of the former. 4-Star engaged in construction and BAF supplied labor to 4-Star.

As pointed out by the Charging Party, on brief, the day-to-day operational decisions of BAF and 4-Star were made by Percy Brown. He decided what the involved employees would be doing on a daily basis. He decided how many of the involved employees would be working on a given day. He decided who would call the Union for employees, sometimes making the calls himself. The record demonstrates that Percy Brown was responsible for operating both BAF and 4-Star and that Aleria Brown's role regarding BAF was almost exclusively administrative.

According to Aleria Brown's, testimony BAF did not have its own equipment but rather it used 4-Star's equipment.

BAF and 4-Star are alter egos and as such they violated Section 8(a)(1) and (5) and Section 8(d) of the Act by abrogating the contract with the Union which covered the involved employees.

With respect to the position taken by Respondent 4-Star in its answer, at the trial herein and on brief regarding res judicata and/or collateral estoppel, the doctrine of res judicata, as pointed out by the General Counsel at the trial and on brief, is not applicable when a prior charge is dismissed before it is adjudicated on its merits. *Sheet Metal Workers Local 38*, 183 NLRB 110 (1970). Similarly, collateral estoppel does not apply here.

CONCLUSIONS OF LAW

1. B.A.F., Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. 4-Star Construction Corp. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
3. The Union is a labor organization within the meaning of Section 2(5) of the Act.
4. The Respondent, as alter egos, violated Section 8(a)(1) and (5) and Section 8(d) of the Act by abrogating the contract with the Union which covered the involved employees.

5. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that BAF and 4-Star unlawfully failed to apply the terms of the collective-bargaining agreement between BAF and the Union to the involved employees, I shall recommend that BAF and 4-Star be ordered to cease and desist therefrom and that they maintain and give full force and effect to the involved contract with the Union which covers the involved employees. BAF and 4-Star will be required to make employees whole, with interest,¹¹ for any loss they may have suffered as a result of the refusal to bargain in good faith with the Union and apply the collective-bargaining agreement for the remainder of its term. In view of the nature of the employment involved herein, posting notices solely at the Respondent's places of business is not adequate to give notice to the involved employees. It will be recommended, therefore, that Respondent, in addition to posting the notice at their places of business, will post copies of the notice at their jobsites, and furnish signed copies of the notice to the Union for posting at the Union's office and meeting place.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹²

ORDER

The Respondent, B.A.F., Inc. and 4-Star Construction Corp., South Euclid, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Failing and refusing to bargain collectively and in good faith with the Union.
 - (b) Failing and refusing to abide by the collective-bargaining agreement applicable to the involved employees through June 30, 1991.
 - (c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Maintain and give full effect to the involved collective-bargaining agreement.
 - (b) Make employees whole for any loss they may have suffered as a result of their refusal to bargain in good faith with the Union and apply the collective-bargaining agreement for the remainder of its term.
 - (c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

¹¹ Under *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest is computed at the "short-term Federal Rate" for the underpayment of taxes as set forth in the 1986 amendment to 26 U.S.C. § 6621.

¹² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Post at their places of business and at each of their jobsites copies of the attached notice marked "Appendix."¹³ Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Sign and return to the Regional Director sufficient copies of the notice for posting by the Union, if it is willing, at its office and meeting halls, including all places where notices are customarily posted.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

¹³If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to recognize and bargain collectively and in good faith with United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the U.S. and Canada, Local 42 as the exclusive representative of our employees in the appropriate unit, or fail or refuse to honor the collective-bargaining agreements applicable to these employees. The appropriate unit is:

Employees engaged in plumbing, steamfitting, pipefitting, refrigeration and shopkeeping within the jurisdiction of the Union as set forth in the preamble of the collective bargaining agreement between the Union and Mechanical Contractors Association of North Central Ohio, LRD Division effective July 1, 1988, through June 30, 1991.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL maintain and give full effect to the collective-bargaining agreement of the United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the U.S. and Canada, Local 42 covering the unit employees.

WE WILL make whole employees for any loss they may have suffered as a result of the refusal to bargain in good faith with the Union and apply the collective-bargaining agreement for the remainder of its term.

B.A.F., INC.

4-STAR CONSTRUCTION CORP.